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# IN THE
# COURT OF APPEALS OF INDIANA

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| KIM D. SCHULTZ, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 02A03-0612-CV-574 |
| | ) | |
| MARC D. SCHULTZ, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Charles F. Pratt, Judge
and the Honorable Thomas P. Boyer, Magistrate
Cause No. 02D07-9809-DR-373

**October 15, 2007**

**MEMORANDUM OPINION – NOT FOR PUBLICATION**

**KIRSCH, Judge**

Kim D. Schultz ("Mother") appeals the trial court's order modifying legal custody of her two children, D.S. and J.S. (collectively the "children"), from her solely, to joint legal custody with Marc D. Schultz ("Father"). Mother raises the two following restated issues relevant to whether the modification of custody was proper:

I. Whether there was a substantial change in the children's adjustment to school or physical health.

II. Whether the custodial modification was in the children's best interest.

We affirm. [1]

## FACTS AND PROCEDURAL HISTORY

Mother and Father were married June 28, 1997 and had two children together – D.S., born September 9, 1995, and J.S., born March 31, 1999. Mother and Father were divorced on January 31, 2002. At that time, the parties agreed Mother would have sole legal and physical custody of the children. Three years later, Father moved to modify custody and claimed that substantial changes had taken place in the children's lives and that custody with their Mother was not in their best interest. Father sought sole physical and legal custody of the children.

At the hearing on the modification, Father presented evidence that Mother had ignored recommendations for the children's care by their doctor and dentist. Specifically, J.S. had been diagnosed with six cavities in her baby teeth, which the dentist recommended be filled. Mother decided against the fillings because she believed the teeth would soon fall out and no

longer require treatment. Mother went against a doctor's recommendation for D.S.'s medical care when she declined two diagnostic tests: a rapid strep test and a chest x-ray to determine whether D.S. had pneumonia. There was also evidence presented that Mother failed to notify Father of the children's medical conditions. The guardian ad litem ("GAL") evaluated Mother, Father, and the children. A court-appointed psychologist evaluated Mother and Father. Both recommended that the parties and their children receive appropriate counseling to address their mental health issues. Mother refused to participate claiming that she could not afford it. The psychologist reported that both Mother and Father had a limited tolerance that lead to emotional outbursts and impulsive actions. Father was ordered to attend Right Relations training but did not complete it.

Mother, who holds a teaching certificate, removed D.S. from public school and began home-schooling him. When J.S. was old enough to attend kindergarten, Mother enrolled both the children in school. At that time, D.S. was behind his peers in reading ability, and he initially received below average grades. The children also tallied several absences during the first year back, and Fort Wayne Community Schools sent Mother a letter warning that if the absences continued, a referral would be made to the Status Offender Court Alternative Program ("SOCAP").[2] There was also evidence that due to Father's work as a contractor, he often had to cancel and miss midweek visitations with the children.

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[1] Mother also contends that the trial court improperly considered her decisions regarding the children's religious training. There is no indication that the trial court based its decision primarily or partly on Mother's religious training choice for the children. Thus, we do not address this issue. *In re Paternity of K.R.H.*, 784 N.E.2d 985, 992-93 (Ind. Ct. App. 2003).

[2] The Status Offender Court Alternative Program "is designed to work with students, parents, and schools to improve school attendance and avoid further legal action." *Resp't Ex.* A.

The GAL testified to the following:

> I'm not sure how to make this conflict go away or how to make this better. They've been through Right Relations, that has not improved it. They've had a psychological evaluation, of which they invalidated all but – I think [Father] invalidated all but one (1) test, and [Mother] invalidated all but two (2) tests, so it really wasn't a good indicator as to what the – you know, the issues were. I mean, they both went in there and, apparently, faked good on the tests, so that was, unfortunately, a waste of money. They still don't communicate well at all. They still argue about the medical treatment, the religious training, the schooling for the kids; and I know that that is not a joint custody normal recommendation, but unfortunately, they seem to – when one (1) has a recommendation for the kids, it's almost like because the other person recommended it, it's gonna be a no, we're gonna argue about it anyway. There seems to be a power struggle.

*Tr.* at 17.

After a hearing on the evidence the trial court entered its judgment and made the following pertinent findings and conclusions:

> 4. There has been a substantial change in one (1) or more of the factors which the Court may consider under IC 31-17-2-8 for purposes of modifying custody.
>
> 5. The current custody and parenting time orders are not serving the best interest of the parties' minor children . . . .
>
> 6. [Mother] has failed to provide appropriate dental care for the parties' minor children. . . .
>
> 7. [Mother] has ignored recommendations from health care providers regarding medical care and treatment for [D.S.]. . . .
>
> 8. [Mother] home schooled the parties' minor children for approximately two (2) years. [D.S.] and [J.S.] were both substantially behind their peers in academic performance when they started the 2005-2006 school year at . . . Elementary School. . . .
>
> 9. During the 2005-2006 school year, [D.S.] and [J.S.] both missed an

10. [Mother] has provided limited religious training for the parties' minor children. [Mother] has also insisted that [Father] not provide religious training for the parties' minor children, and in particular that [Father] not take the children to mass at a Catholic church during his parenting time with the children. . . .

11. [Mother] has made obscene gestures to [Father] in the presence of the parties' minor children during exchanges for parenting time.

12. During phone conversations with [Father] regarding matters pertaining to the parties' minor children, [Mother] has irrationally yelled and screamed at [Father], and used language which was totally inappropriate and appalling. . . .

13. Since the entry of the Decree, there have been constant problems and difficulties regarding parenting time. The Court has entered at least five (5) separate orders in an effort to resolve the problems and difficulties associated with parenting time.

14. On March 16, 2005, the Court entered the following orders in this matter:

    16. [Mother] and [Father] shall at all times have a working land line phone or cell phone with voice mail. [Mother] and [Father] shall immediately exchange the phone numbers for all of their land line phones and cell phones, and notify the other party within forty-eight (48) hours of any change in their phone numbers. [Mother] and [Father] shall respond to any voice mail from the other party pertaining to their children, including but not limited to parenting time, as soon as possible, and no later than twenty-four (24) hours after the message is left on their voice mail.

    17. [Mother] and [Father] shall at all times have e-mail and exchange their e-mail addresses. [Mother] and [Father] shall use e-mail as a secondary method of communication to confirm verbal communication, and to leave a message for the other party when the parties have not been able to communicate directly with each other by phone or in person.

15. [Mother] is found to be in contempt for her willful violation of Paragraphs 16 and 17 from the Court's order of March 16, 2005.

16. [Mother] is employed with the United States Postal Service. [Mother] works six (6) days per week, Sunday night through Friday night, from 11:00 p.m. to 5:00 a.m.

17. While [Mother] is at work and sleeping, the parties' minor children are generally under the care and supervision of [Mother]'s mother, Dolly Coomer. The children arrive at Ms. Coomer's residence at approximately 9:00 p.m. and stay overnight.

18. [Mother] generally has the parties' minor children in her care and supervision from 2:30 p.m. to 9:00 p.m. on the days of the week she works.

* * *

20. The parties' minor children attend Haley Elementary School.

21. [Father] is married to Mary Schultz. [Father] and his wife have a stable relationship and reside in Southwest Allen County.

22. [Father] is self employed as a contractor. The primary focus of [Father]'s business is the construction of mausoleums. [Father] generally works outside Allen County and the State of Indiana.

23. Due to his work schedule, [Father] is not always able to exercise his regularly scheduled parenting time with the parties' minor children. It is in the best interest of the parties' minor children that [Father] give [Mother] reasonable advance notice when he will not be able to exercise his parenting time with the parties' minor children. It is also in the best interest of the children that [Mother] be cooperative and flexible in regards to the scheduling of [Father]'s parenting time with the parties' minor children.

* * *

25. The Guardian Ad Litem for the parties' minor children has recommended that [Mother] and [Father] share joint legal custody of their children, with [Mother] having primary physical custody of the children. . . .

26. It is in the best interest of the parties' minor children that [Mother], [Father], and the children participate in counseling to address various mental health issues. . . .

27. It is in the best interest of the parties' minor children that the Court's order of January 31, 2002, granting [Mother] sole legal custody of the parties' minor children be modified to joint legal custody with [Father].

28. It is in the best interests of the parties' minor children that [Mother] continue to have primary physical custody of the parties' minor children, with modifications to [Father]'s current parenting time schedule.

29. [Mother] and [Father] are granted joint legal custody of the parties' minor children, with [Mother] having primary physical custody of the children.

* * *

42. [Mother] and [Father] shall not disparage, criticize, or condemn the other parent in the presence of the parties' minor children.

* * *

48. As joint legal custodians of the parties' minor children, either [Mother] or [Father] may make arrangements regarding health care treatment for the children. Unless there is an emergency, [Mother] and [Father] shall consult with each other prior to obtaining health care treatment for the parties' minor children, and give each other reasonable advance notice regarding any scheduled health care treatment for the children. If one of the parties' minor children has an acute illness such as the flu, strep throat, or bronchitis, and the party who has physical custody of the child is unable to directly communicate with the other party, then the party who has physical custody of the child shall obtain appropriate health care treatment for the child.

49. [Mother] and [Father] shall use the same health care providers for the parties' minor children, and keep each other fully informed regarding the health of the children and the status of health care treatment for the children.

50. [Mother] and [Father] may take the parties' minor children to the

church of their choice when the children are in their respective physical custody.

51. Unless otherwise agreed by [Father] and [Mother], the residence for purposes of enrolling the parties' minor children in school shall be [Mother]'s residence.

* * *

*Appellant's App.* at 16-21.

Mother now appeals.

## DISCUSSION AND DECISION

The modification of a custody order lies within the sound discretion of the trial court. *Bettencourt v. Ford* , 822 N.E.2d 989, 997 (Ind. Ct. App. 2005) (citing *Spencer v. Spencer*, 684 N.E.2d 500, 501 (Ind. Ct. App. 1997)). In our review of such matters, we afford great deference to the trial court, which was in the best position to observe, scrutinize, and review the evidence presented. *Id.* To reverse the trial court, the evidence must conclusively support the appellant's position. *Id.*

The trial court entered findings of fact and conclusions when it issued its order modifying custody. "When reviewing the trial court's findings of fact and conclusions thereon, we consider whether the evidence supports the findings and whether the findings support the judgment." *Id.* Findings are clearly erroneous when the record contains no evidence that directly or by inference supports the facts within. *Id.* A conclusion is clearly erroneous if it applies the wrong legal standard to the properly found facts. *Id.* To be clearly erroneous, the finding of fact or conclusion must leave us with a firm belief that a mistake has been made. *Id.*

Under IC 31-17-2-21(a), a court may only modify the custody of a child when: "(1) the modification is in the best interest of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 8 and, if applicable, section 8.5 of this chapter." The moving party bears the burden to prove the modification of custody is in the best interest of the children and there has been a substantial change in their life. *See Leisure v. Wheeler*, 828 N.E.2d 409, 414 (Ind. Ct. App. 2005); *see also Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002).

*A. Substantial Change*

Mother asserts that the trial court erred in determining there has been a substantial change in the children's adjustment to school and in their health. She claims there is not sufficient evidence to support the trial court's substantial change finding and that, as the legal custodial parent, she had the exclusive power to make choices regarding the children's health care, religion, and schooling. Mother contends that only circumstances that have occurred since the date of the Decree are relevant. *Hanson v. Spolnik*, 685 N.E.2d 71, 77 (Ind. Ct. App. 1997).

Regarding school, evidence was presented that when D.S. was in the first grade in public school, Mother, removed him from public school and began to home-school him. Two years later, Mother enrolled D.S. in the fourth grade back at public school. Initially, D.S. was not up to his grade level in grammar and reading. During the school year, D.S.'s grades slowly improved, and he was approaching his grade's reading level. On his ISTEP, D.S. passed the math portion, but failed the language arts portion. J.S. exceeds, meets, or approaches standards and expectations, in all subjects. *Pet'r.'s Ex.* 13. There also was

evidence that the children have missed a substantial number of days in school, and that mother was sent a letter by Fort Wayne Community Schools warning that if the children's attendance did not improve, the matter would be forwarded to SOCAP.

As to health, evidence was presented that Mother chose not to have D.S. undergo a rapid strep test and chest x-ray when D.S. was sick, fill six cavities in J.S.'s baby teeth contrary to the dentist's recommendation, and seek follow-up care for D.S. from the allergist. Further, evidence demonstrated that the mental health of all the parties involved is in question. Several doctors and the GAL spent over 68 hours of counseling to evaluate the parties' mental health, mediate the relationship of the parents, and appraise the impact of their relationship on the children, all to battle for the children's best interest. The GAL concluded that initial counseling has not improved their situation.

Here, the trial court found that Mother failed to provide appropriate dental care, that she ignored recommendations of healthcare providers regarding D.S., that D.S. was substantially behind in school during their Mother's care; and that the children missed excessive amounts of school under their Mother's care. The evidence supported these facts, and the facts supported the trial court's judgment that there has been a substantial change in the statutory factors: adjustment to education and health.

*B. Best Interest*

Mother also contends that the trial court erred in determining that joint legal custody is in the best interest of their children. Specifically, Mother argues the children's best interests are not served if joint custody is awarded to two parents who are unable and unwilling to communicate.

In support, Mother cites *Aylward v. Aylward*, 592 N.E.2d 1247, 1252 (Ind. Ct. App. 1992), which stated that a trial court abused its discretion when it awarded joint custody to parents who have made child rearing a battleground. In *Aylward*, this court reviewed facts similar to those presented here – the parents expressed animosity toward one another in front of the children, the parents fought over whether the children should be home-schooled, and both parents either deliberately or unintentionally discussed the other parent in a negative light in front of the children. *Id.* at 1249-50. The court stated that, "awarding and maintaining a joint custody arrangement primarily to placate the parents should be avoided as not in the best interest of the child." *Id.*

Mother identifies several "obstreperous" events between the parties, which illustrate their inability to reach a consensus on fundamental child-rearing issues. *See Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221-22 (Ind. Ct. App. 2006) (citing *Aylward*, 592 N.E.2d at 1251-52). Mother filed a missing persons report while Father had the children during visitation. Father filed a complaint with Child Protective Services against Mother for her decisions related to the children's healthcare. During visitation, the parents ignored each other, and when they spoke, they "cut each other off." *Tr.* at 80. Father has filed at least eighteen police reports against Mother regarding visitation. Mother has filed at least thirty police reports against Father regarding visitation.

Alternatively, Father argues that antagonism and a lack of cooperation between parents may make sole legal custody unreasonable. In *Pierce v. Pierce*, 620 N.E.2d 726, 731 (Ind. Ct. App. 1993), the court stated, "[a] parent may not sow seeds of discord and reap improved custody rights." Father contends that the same legal incentive should be applied to

decrease or extinguish Mother's lack of cooperation. Further, Father claims that *Aylward* is distinguishable from this case because although there exists discord between Mother and Father, the antagonism is not as egregious as that in *Aylward* where the mother had accused the father of sexually molesting the children. Also in *Aylward*, the mother and father did not live near each other like Mother and Father do here. Father asserts that the children's best interests are served by allowing him to share legal custody and thereby help counteract the negative substantial changes in the children's healthcare and adjustment to education.

In determining whether modification of joint legal custody is appropriate, courts foucus on the best interest of the child. IC 31-17-2-15(2); *Arms v. Arms*, 803 N.E.2d 1201, 1210 (Ind. Ct. App. 2004). "'[A] successful joint custody arrangement requires only that the parents be able to isolate their personal conflicts from their roles as parents and that the children be spared whatever resentments and rancor the parents may harbor.'" *Walker v. Walker*, 539 N.E.2d 509, 512 (Ind. Ct. App. 1989) (quoting *Beck v. Beck*, 86 A.2d 63, 71 (N.J. 1981)). In *Walker*, this court found joint custody appropriate because there was no evidence that the parents had "fundamental differences in child rearing, philosophies, religious beliefs, or lifestyles," and there was evidence that the parents were able to set aside their personal differences for the interests of the children. 539 N.E.2d at 513.

Here, the trial court's findings noted the parties' antagonism and discord and concluded that sole physical custody with Mother and joint legal custody was in the children's best interests. Mother has failed to show that this determination is clearly erroneous.

Affirmed.

ROBB, J., and BARNES, J., concur.